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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1955.

No. 393

BENNIE LAZAROV, JACOB CARL EPSTEIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

WILLIAM GERBER,
Sterick Building,
Memphis, Tennessee,
L. E. GWINN,
Columbian Mutual Tower,
Memphis, Tennessee,
For Petitioner Lazarov.

IRVING M. STRAUCH,
81 Madison Building,
Memphis, Tennessee,
For Petitioner Epstein.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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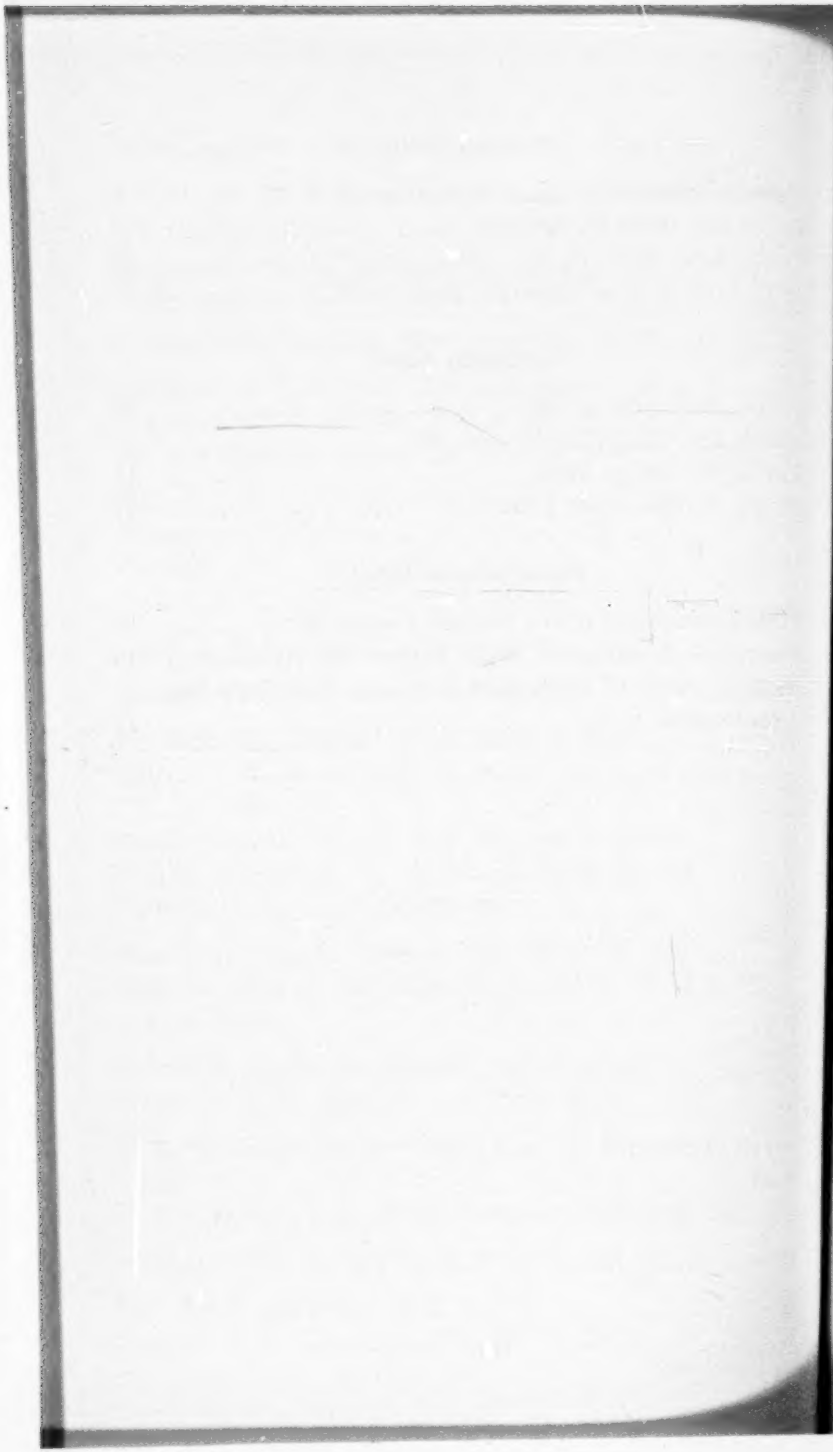

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OCTOBER TERM, A. D. 1955.

No. .....

BENNIE LAZAROV, JACOB CARL EPSTEIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Bennie Lazarov and Jacob Carl Epstein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered June 28, 1955, and Petition for Rehearing denied August 24, 1955.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), Rules 21-33 of this Court, and Rule 37 (c) of the Federal Rules of Criminal Procedure.

OPINIONS OF THE COURT.

No opinion was filed in the District Court. The opinion of the Court of Appeals is printed herewith as an appendix to the Petition. A transcript of the record as required by the rules of this Court accompany the Petition.

QUESTIONS INVOLVED.

1. **Whether there was any substantial evidence, direct or circumstantial, that petitioners entered into the unlawful agreement alleged in the indictment.**

2. **Under a conspiracy indictment which charged that petitioners, "while operating as partners," entered into a conspiracy with their co-defendant Kimberling, an employee of the Government, to defraud the Government in the sale of salvage rope through the removal of a part of the rope from the trucks of petitioners before the weighing thereof, it being the duty of Kimberling to certify the weights of rope on which the Government based its payments, was Kimberling's acquittal by the jury destructive of the basis of the conspiracy so as to require the discharge of petitioners?**

3. **Did the Court err in giving the following instruction in his general charge to the jury:**

> "Ladies and gentlemen, you enter upon this investigation with a presumption that the defendants are not guilty of any crime, and this presumption stands as a witness for them until it is rebutted and overturned by the Government by competent and credible proof. It is, therefore, incumbent upon the Government, before you can convict the defendants, to establish to your satisfaction beyond a reasonable doubt that the crime, or crimes, charged in the indictment, and every

constituent element thereof, have been committed; that the same was committed within the Western Judicial District of Tennessee, the Western Division, before the finding of this indictment. **And there is not any question about that. The Court instructs you as a matter of law that it did happen in this particular division of the Court. And that the defendants at the bar committed the crime, or crimes, in such manner as would make them guilty under the law heretofore defined and explained to you.''**

4. Did the Court err in permitting Assistant District Attorney Vaden in his opening argument and District Attorney Fitzhugh in his closing argument to appeal to the passion and prejudice of the jury and inject extraneous prejudicial matters into the proceeding in the following, among other, particulars:

(a) The reference by Mr. Vaden to ''all of this hocus-pocus going on all over this country,'' his demand that the jury ''stand up once,'' and his assertion that petitioners would not be prosecuted if the District Attorney and his assistant did not believe they were guilty;

(b) The assertion of the District Attorney that he would cut off his ''right arm above the elbow'' before he would ask a jury to send an innocent person to the penitentiary;

(c) His assertion that the FBI had been ruthlessly attacked and denounced as a bunch of liars and crooks;

(d) His assertion that there has been a lot of ''defrauding of the Government going on and that there is but one way to stop it''?

STATEMENT OF THE CASE.

Petitioners, Bennie Lazarov and Jacob Carl Epstein, who proved an excellent reputation for truth, veracity, honesty, and integrity, operated as partners the L & E Rag and Paper Company, Memphis, Tennessee, and carried on a substantial business in that city. Jointly indicted with them was Don J. Kimberling, an employee of the United States Government, working in the Salvage Section of the United States Engineers at their depot in West Memphis, Crittenden County, Arkansas. The Engineers' office had no scales adequate to weigh truck loads of rope, and when sales were made of salvage rope, it was the duty of Kimberling to follow the truck of purchaser, observe the weighing of the rope, and certify to the weight in order that the United States should receive payment for each and every pound of salvage rope.

The status of the parties as stated is set out in the indictment and also established without dispute in the evidence (App. 4a, 13a).

Kimberling was acquitted by verdict of the jury (App. 9a). The Court of Appeals at page 3 of its Opinion states that:

> "A reading of the complete transcript of the testimony indicates that the Government was of the Opinion that Kimberling was the key man in the conspiracy for the obvious reason that it considered that the claimed fraud could not have been carried out without his connivance."

The contention of Petitioners is thus aptly stated at page 3 of the Opinion of the Court of Appeals:

> "Appellants claim that all of the rope was weighed first at the official scales; that thereafter, a certain amount of rope was removed from some of the trucks

for the purpose of mixing it with an inferior grade of rope in order to get a better price for the batch; that appellants, after purchasing the rope from the government, sold it at an increase in price to A. Karchmer & Sons, of Memphis; that, after the rope was weighed, they transported it to Karchmer's place of business, where it was loaded into boxcars for shipment to Karchmer's customers in New York, and that they paid the Government for all the rope they secured at the Engineers Depot, and which they subsequently sold to Karchmer."

It appears without dispute in the record that the Government was paid in accordance with the weight tickets furnished by the Southern Tin Compress Company which weighed the rope under the supervision of Kimberling. His sworn statement was taken by the FBI agents during their investigation of the case. At the time he was interviewed, no arrests had been made or charges preferred and Kimberling had not consulted counsel. The interviewing agents were also attorneys. Kimberling's sworn statement contains this recital:

"'None of these trucks went into Lazarov Brothers place of business before they were weighed.

"'To my knowledge all six of these trucks were weighed at the Southern Tin Compress Corporation and no rope was taken off of these trucks before they were weighed'" (R. 76a).

This statement was introduced by the Government (App. 76a).

In an effort to show that rope was removed prior to the weighing thereof, the Government introduced an illiterate Negro named Rayford. When this witness was first interviewed by the FBI Agents, he told them that rope was removed from the trucks on appellants' premises **only** after it was weighed at the scales (App. 7).

Speaking of this witness, the Court of Appeals said that he was "Afraid that he might go to jail unless he told the agents what they wanted to hear regardless of the facts," and further that his evidence, because of its "uncertainty and contradictions would not sustain the verdict of the jury" (Op., page 7).[1]

Speaking of the testimony of the FBI Agents, the Court of Appeals at page 8 of the Opinion, said:

> "Most of this testimony is very unsatisfactory, as it is impossible to ascertain whether the government car coming on surveillance, when the other government car went off, actually picked up the trail of the trucks that were sought to be followed. The agents in one government car, at such times, would not see the agents in the other government car. They would assume that the other car had picked up the trail, but the important questions whether that was actually done, and when, and where, are left, in most instances, to conjecture."[2]

At page 11 of the Opinion, the Court of Appeals, referring to 5160 pounds of rope which had been removed from the trucks, the Government contending that this removal was prior to the weighing thereof and Petitioners' that it was **only removed from the trucks after they had been weighed at the Southern Tin under the supervision of Kimberling**, states: "It is this particular batch of rope upon which the whole case before us depends." All of the FBI Agents testified that the six loads of rope which were hauled from the U. S. Engineers and weighed at the Southern Tin Compress Company and the seventh load contain-

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[1] Notwithstanding its finding that some of the FBI agents pressured the witness Rayford to tell them what they "wanted to hear, regardless of the facts," the Court based its approval of the verdict upon the superficial observation of these agents.

[2] Should a citizen be deprived of his liberty on "*conjecture*"?

ing 5160 pounds removed either before or after the weighing of the trucks at the Southern Tin Compress Company, were delivered to Karchmer and Sons and were all loaded in the ATSF car (App. 57a, 58a, 143a). Among the agents so testifying was Stanton, and we quote from his testimony as follows:

> "Q. You are positive there is no question but that the truck with the 5,160 pounds went to the ATSF car, are you not?
>
> A. I am positive that the last load which we have referred to as the seventh load went into that car" (App. 143a).

Although he testified as above set forth, Stanton testified that Karchmer stated to him that the 5160 pounds of rope was loaded into the IC car (App. 142a). Karchmer denied making any such statement.

Stanton further testified that he made notes of his conversation with Karchmer. When these notes were produced, they made not the slightest reference to any such statement on the part of Karchmer (App. 144a, 145a).

Irrespective of any statement of Karchmer or testimony of Stanton, it would have been a physical impossibility to have loaded this 5,160 pounds of rope in the IC car which had been gone for four hours before this rope was sent to Karchmer's place (App. 108a). There is no evidence in the record that Petitioners knew or had any reason to believe that their trucks had been under surveillance by the FBI Agents, nor is there any evidence that a single pound of Government rope was found on the premises of Petitioners after the delivery of the rope had been made to Karchmer and Sons.

With the exception of 210 pounds, representing a bumper in the Government rope, which was rejected by Karchmer,

he paid Petitioners according to the Government weights and the ticket for 5,160 pounds, representing the seventh load was not taken into consideration in making this payment, but the 5,160 pounds were included in the 55,000 pounds of net rope received by Petitioners from the U. S. Engineers according to the weights at the Southern Tin Compress, made under the supervision of Kimberling (138a, 139a).

At page 11 of the Petition for a Rehearing, there is set out a tabulation showing the sequence in which the rope was delivered and handled. An examination of this tabulation will show:

(a) The Government received pay for all the rope it delivered to Petitioners.

(b) That the correspondence of the railroad weights with the weights certified by Kimberling at the Southern Tin Compress Company, establishes to a mathematical certainty that no rope was removed prior to the weighing thereof.

Petitioners explained to the FBI Agents why 5,160 pounds of rope was removed from the trucks after the weighing thereof and why this rope was replaced before the delivery to Karchmer was completed. This explanation is consistent with Karchmer's testimony and with the contention of Petitioners that the Government was paid for all the rope it delivered to them (App. 77a, 137a, 138a, 141a).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED.

I.

There is no substantial evidence to support the verdict of the jury.

(a) The charge was conspiracy, and, according to the Opinion of the Court of Appeals, Kimberling was the key man in the conspiracy alleged in the indictment. There was no evidence direct or circumstantial that petitioners had entered into a conspiracy with Kimberling. The most that can be said for the Government's evidence is that petitioners were responsible for certain overt acts but it is well settled that a conspiracy may not be established by proof of overt acts alone.

Linde v. U. S. (8th Cir.), 13 F. 2d 61;
Tinsley v. U. S. (8th Cir.), 43 F. 2d 492;
Hall v. U. S. (10th Cir.), 109 F. 2d 976.

(b) If any evidence in the record even tends to establish a criminal act on the part of petitioners or anyone else, that offense was the larceny of a small quantity of rope having an approximate value of $375.00, which would have been punishable under Title 18, Sec. 641 of the U. S. Code. No such offense is charged in the indictment, and it is well settled that the conviction of an accused for an offense not charged in the indictment is a denial of due process.

Thornhill v. State of Alabama, 310 U. S. 88.

(c) The Court of Appeals, after rejecting the principal evidence and the main contention of the Government, predicated its affirmance upon deductions which amount to nothing more than conjecture or speculation (see pages

13, 14 of Opinion). Even in a civil case a finding of negligence may not be predicated upon mere conjecture or speculation.

Patton v. Texas & Pacific R. R. Co., 179 U. S. 658, 45 L. ed. 362.

In so insisting, we are not asking the Court to infringe upon the rule that the Federal Appellate Court will not weigh conflicting evidence, but this rule does not preclude a reviewing court from examining the record to determine whether there is any "competent and substantial" evidence to sustain a verdict.

U. S. v. Socony Vacuum Oil Company, 310 U. S. 150.

To be classified as "substantial," the evidence must be competent, credible, and such as a reasonable man might accept as adequate to support a conclusion.

Edison Co. v. National Labor Relations Board, 305 U. S. 197, 229.

In **Murphy v. U. S.** (8th Cir.), 18 F. 2d 509, the court stated the principles that should be applied to the testimony of the FBI Agents in this case. We quote from the opinion as follows:

> "It is universally recognized that we may not speculate as to the reasoning or considerations that lead to the verdict of the jury." . . .
>
> "We are left with suspicion and presumption only, in all these respects. It is entirely possible, if not probable, that these gaps could have been closed by proper investigation. We are not permitted to supply the missing links.[3] Such casual and superficial methods on the part of enforcement officers should not be

[3] If rope was removed from any of the trucks before the weighing thereof in the presence of the FBI agents, they could have closed the gaps and supplied the missing links by then and there arresting the drivers, as they had the lawful right to do (Title 18, Sec. 3052).

indulged. Courts should not strain the principles established for the protection alike of society and those accused of crime."

The principles stated apply to the inference drawn by the Court of Appeals and the questions asked by that court at page 13 of the Opinion. And also to the superficial observation of the FBI agents that form the basis of their conclusion that some of the trucks had smaller quantities of rope when weighed at Southern Tin than when they left the Engineers Office in West Memphis. These agents had never had any experience in observing the handling and loading of rope and knew nothing about driving over the streets and rough places on the appearance of the load. Moreover, one of them testified that he followed four loads of the rope and that so far as he could tell, the loads were identical from the time they left West Memphis until the time they got to Karchmer and were unloaded. The timing as fixed by the only agent who claimed to have observed the removal of any rope from the trucks on petitioner's premises was such that this could have been subsequent to the weighing at the Southern Tin Compress Company (App. 19a, 24a, 56a, 57a, 67a, 68a. See also pages 12, 13 of the Petition for Rehearing, filed in the Court of Appeals).

The inferences to be drawn from the testimony of the FBI agents were as consistent with the contention of petitioners that no rope was removed prior to the weighing thereof as they were with the claim of the government that some rope was removed from the trucks before it was weighed at the scales of Southern Tin Compress Company, and it is a familiar rule that where from certain facts or circumstances different inferences may be drawn, some favorable and some unfavorable to the accused, the most favorable to the accused should be adopted.

Hyde v. U. S. (8th Cir.), 15 F. 2d 816;
People v. Burgard, 377 Ill. 322, 34 N. E. 2d 558.

Any inference that rope was removed before the weighing thereof is in conflict with the positive statement, made under oath by Kimberling (App. 76a), and voluntary statements made to the agents by petitioners (App. 77a, 99a). Having introduced these exculpatory statements, the government was bound by them until their falsity was shown beyond a reasonable doubt.

Young v. U. S. (5th Cir.), 97 F. 2d 200, 202, and authorities therein cited.

It seems clear of doubt that the Court of Appeals in its deductions inadvertently overlooked the following material facts established by undisputed testimony:

1) The 5160 pounds of rope was loaded into the ATSF car.

2) The transfer of 4000 pounds of rope from the ATSF car to the IC car, this being done before the IC car left the tracks about 1:00 P. M. on March 6.

3) The fact that Karchmer intended to sell the rope he purchased from petitioners on "consumers' reports," and when informed of this petitioners decided not to mix any rope but to let Karchmer have only the rope they had purchased from the government and on the basis of the government weights. Mixing an inferior grade of salvage rope with a superior grade of such rope was a common trade practice (App. 136a, 137a). But in this case it might have resulted in the rejection from the purchasers of Karchmer of the entire load of rope and to avoid the inconvenience or possible loss in the event of such rejection, Petitioner Lazarov informed his office by telephone not to send any rope to Karchmer except rope purchased from the government, and this instruction was responsible for the sending of 5160 pounds of rope taken off of the truck to Karchmer's place of business. Settlement was made on the basis of the government weights and the ticket for 5160 pounds was not taken into consideration by Karchmer in the payment

for the rope (App. 138a). This change in plan was a matter that only concerned petitioners and Karchmer and the government had no interest in it.

4) When consideration is had of the 4000 pounds of rope transferred by Karchmer from the ATSF car to the IC car, made before the 5160 pounds of rope was sent to Karchmer's place, the railroad weights at St. Louis tallied with the weights of the rope at Southern Tin, made under the supervision of Kimberling and certified by him as the basis on which petitioners paid the government (App. 94a). After the weights were thus certified, petitioners had the right to sell the rope to Karchmer or to keep it for their own use, and were under no obligation to the government except to pay for the rope according to the weights certified by Kimberling. This they did.

The foregoing facts are established by undisputed testimony and are destructive of any inferences that may be drawn from circumstances relied upon by the government.

Pa. R. R. Co. v. Chamberlain, 288 U. S. 333.

II.

The acquittal of Kimberling was destructive of the basis of the conspiracy so as to require the discharge of Petitioners.

(a) The contention of Petitioners presents an important Federal question which has not been, but should be, determined by this Court.

(b) The holding of the Court of Appeals in this case is in conflict with the holding of the Court of Appeals for the Second Circuit in **Feder et al. v. United States of America,** 2d Cir., 257 Fed. 694, and with the holding of the Court of Appeals for the Eighth Circuit in **Murphy v. United States,** 18 F. 2d 509.

(a) and (b) hereunder will be discussed together. The Court of Appeals recognized that Kimberling was the key man in the conspiracy as alleged in the indictment, but held that his acquittal was of no avail on appeal to Petitioners, citing **Baxter v. U. S.**, 6th Cir., 45 F. 2d 487, and **U. S. v. Austin Bagley Corp. et al.**, 2d Cir., 31 F. 2d 229, in support of the conclusion reached. Neither case is applicable to a situation where the verdict was equivalent to a finding that there was no conspiracy. For instance, the Court in **U. S. v. Austin Bagley Corp.**, supra, recognized the principle that the "Verdict must not itself deny the existence of the essential facts," and there is ample authority for the conclusion that where the basis of a charge of conspiracy is "swept away" by the acquittal of one of the alleged conspirators, the verdict against the other must be set aside (**Feder v. U. S.**, 2d Cir., 257 Fed. 694; **Murphy v. U. S.**, 8th Cir., 18 F. 2d 509).[4] The language used by Judge Donahue in the dissenting Opinion in **Gozmer v. U. S.**, 6th Cir., 9 F. 2d 603, applies with peculiar force to the verdict in the instant case and we quote therefrom as follows:

> " 'This is not merely a logical inconsistency, such as arises where a jury returns a verdict of not guilty on one count and guilty on another count charging a separate and distinct offense, when the same evidence equally justifies a conviction on both counts, but a legal inconsistency, not reconcilable upon any tenable theory. If this verdict is not fatally inconsistent and repugnant, then these terms may as well be dropped from our legal vocabulary.' "

Judge Donahue's dissenting Opinion was cited, quoted with approval, and applied to the factual situation before the Court of Appeals for the Eighth Circuit in Murphy v.

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[4] Green v. Commonwealth, 264 Ky. 725, 95 S. W. 2d 561;
15 C. J. S., § 94, p. 1164;
11 Am. Jur., § 26, p. 560.

U. S., supra, and is in accord with the fundamental conception of due process as protected by the 5th Amendment to the Federal Constitution.

True it is that the 5th Amendment, applicable to Federal agencies, unlike the 14th Amendment, protecting the citizens against an arbitrary exercise of power by the State, does not contain an equal protection clause, but it is equally true that an **"arbitrary discrimination between persons in similar circumstances"** violates the due process clause of the 5th Amendment. **Wallace v. Currin** (4th Cir.), 95 F. 2d 856, 867.

As stated by the Supreme Court in **Hurtado v. California**, 110 U. S. 516:

> "Law is something more than mere will exerted as an act of power. **It must not be a special rule for a particular person or a particular class.**"

Under our system of laws, there is no room for "the play and action of purely personal and arbitrary power." **Yick Wo v. Hopkins**, 118 U. S. 356.

An "arbitrary and capricious" exercise of power is prohibited by the due process clause of the Federal Constitution. **American Railway Express Company v. Kentucky**, 273 U. S. 269.

Is the verdict of the jury beyond the reach of the fundamental concept of fairness inherent in "due process?"

We do not know on what grounds the jury convicted petitioners and acquitted Kimberling. Was it on account of race, or religion, or financial standing, or looks, or what not? We do not know. But the record will be searched in vain for even a colorable justification for the arbitrary and discriminatory verdict rendered in this case.

III.

Petitioners were denied a fair and impartial trial.

Some of the investigating FBI agents appear in a bad light in this record. The Court of Appeals recognized this when it held that they put the negro Rayford in fear "that he might go to jail unless he told the agents what they wanted to hear, regardless of the fact" (Op. p. 7).

Moreover, Stanton, in attempting to impeach Karchmer, impeached himself. His testimony on rebuttal attempting to show by implication that the 5160 pounds of rope was loaded into the I. C. car was in direct conflict with his testimony on his examination in chief that he positively knew that it was loaded in the ATSF car. The very notes that he kept of his conversation with Karchmer tended further to discredit his testimony.

In calling attention to these matters, we are not making an attack upon the FBI, which we regard as a great agency. But all the FBI agents are not sacrosanct and the testimony of Stanton may not be excused on the ground that he was an FBI agent, nor the amateurish method followed in this investigation condoned on the ground that it was made by FBI agents apparently more interested in playing with the radios in their cars than they were in observing the trucks of petitioners.

The Court of Appeals declared most of this testimony "very unsatisfactory" and held that in most instances it left the important questions to "conjecture." (See page 8 of the Opinion.)

The Court of Appeals apparently excused improper argument of the District Attorney and his assistant on the ground that it was called forth by "arguments of counsel for appellants and was in answer thereto" (p. 16, Op.). In this the Court of Appeals was in error. Assistant District Attorney Vaden, in his opening argument, referred

to the " 'hocus pocus' going on all over the country," demanded that the jury "stand up once," and asserted that the petitioners would not be prosecuted if the District Attorney and his assistant did not believe they were guilty.

There was a clash between counsel for one of petitioners and the District Attorney who objected to the argument of Mr. Gerber. The court sustained that objection (App. 151a) and that should have ended the matter, but thereafter the District Attorney asserted that "Lazarov was engaged in big business and got bankers to testify for him"; that he never would have presented this indictment to the grand jury and never would have come before you if he had not thought these people were guilty—these defendants—beyond a reasonable doubt." And also, "that he would cut off his right arm above the elbow before he would ask the jury to send an innocent man to the penitentiary." These arguments were not germane to any statements made by Mr. Gerber[5] and run foul of the principle pronounced by this Court in **Berger v. U. S.**, 295 U. S. 78, and by the Court of Appeals (6th Cir.) in **Pierce v. U. S.**, 86 F. 2d 949, 953, in which the Court said:

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[5] The objectionable remarks of Assistant District Attorney Vaden were made in the opening argument and may not be excused on any argument made by Mr. Gerber (App. 148a). Mr. Vaden's argument clearly conveyed to the jury the personal opinion of the prosecuting attorneys that these attorneys believed that the accused was guilty and that the jury ought to "stand up" and find them guilty. This opinion was emphasized in the closing argument of District Attorney Fitzhugh (App. 179a). There is abundant authority for concluding that the expression of a personal opinion by the District Attorney that the accused is guilty constitutes reversible error.

State v. Thayer, 124 Ohio St. 1, 176 N. E. 656, 75 A. L. R. 48;
People v. Beal, 116 Cal. App. 476, 254 P. 2d 101;
Byrd v. State, 72 Ga. App. 840, 35 S. E. 2d 385;
Fitzgerald v. State, 91 Okla. Crim. 437, 219 P. 2d 1024;
Commonwealth v. Ronello, 251 Pa. 329, 96 Atl. 826;
State v. Gunderson, 26 N. D. 294, 144 N. W. 659;
53 Am. Jur. 392, "Trial," Sec. 486;
23 C. J. S., Sec. 1104, p. 578;
No. 15, Canons of Professional Ethics—American Bar Association.

". . . Similar latitude in respect to irrelevant matter permitted to counsel for the defendants neither vindicates nor palliates the license assumed by the prosecutors, nor lessens its destructive effect upon the fairness of the trial . . ."

IV.

The charge of the trial judge was unfair in respect to the refusal of Special Requests and in statements made affirmatively during the delivery of the charge.

Among the Special Requests refused was one asking that the jury be instructed that an officer of the law has the right and authority to make an arrest for an unlawful offense committed in his presence; "that an overt act alone is insufficient to constitute a conspiracy. There must be an unlawful agreement to which the overt act may be referred." Affirmative error in the charge included the statement that the venue was within the Western jurisdiction of Tennessee, and "that the defendants at the bar committed the crime or crimes in such manner as would make them guilty under the law heretofore defined and explained to you."

The Court of Appeals, speaking of this portion of the charge, said:

"The government's interpretation of the instruction is completely persuasive . . ." (See page 16, Op.)

The language of the charge is plain and unambiguous, and, where this is true, even in a statute, there is no room for interpretation or construction.

Hamilton v. Rathbone, 175 U. S. 414, 419;
Gaminetti v. U. S., 242 U. S. 470, 485.

The only way in which a court could determine that no prejudice resulted to the accused from the use of this lan-

guage, whether considered "interpolation" or something else, would be to speculate as to what might have influenced the jury, and a verdict that requires speculation is a bad verdict and should not be sustained.

CONCLUSION.

We are not invoking the de minimis rule, which has no application to criminal cases, but it is respectfully submitted that it is so highly improbable that men situated as petitioners, possessed of ample means and enjoying a large volume of business, having dealt with the government satisfactorily for many years would have jeopardized their standing and risked their liberty for the amount involved in this case, this being approximately $375.00. This fact and the further fact that no arrests were made or prosecution instituted for several months after the claimed observation of the FBI agent, resulting from an anonymous tip, raises a question mark as to why this prosecution was instituted and prosecuted in the manner disclosed by the record.

Moreover, the government, so far as the record discloses, had made no effort to recover the value of this rope and the probabilities arising from these circumstances are proper to be considered in determining why this prosecution was instituted and conducted in the manner disclosed by the record.

It was the theory of the government as set forth in the indictment and attempted to be proven that Kimberling was the "key man" in the conspiracy, this theory being recognized by the Court of Appeals in its Opinion. If this be true, wherein was there any difference between the acquittal of Kimberling in this case and the acquittal of one or two alleged co-conspirators?

PRAYER.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled on its docket, "Bennie Lazarov, Jacob Carl Epstein, Appellants, v. United States of America, Appellee, Nos. 12,172, 12,173" to the end that said case may be reviewed and determined by this court as provided by 28 U. S. C., Sec. 1254, and the applicable rules promulgated by this court governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this honorable court, and that petitioners may have such other and further relief in the premises, as to this honorable court may seem right and proper.

WILLIAM GERBER,
Sterick Building,
Memphis, Tennessee,
L. E. GWINN,
Columbian Mutual Tower,
Memphis, Tennessee,
IRVING M. STRAUCH,
81 Madison Building,
Memphis, Tennessee,
Attorneys for Petitioners.

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OPINION OF THE COURT OF APPEALS.

(Filed Jun. 28, 1955. Carl W. Reuss, Clerk.)

Nos. 12172, 12173.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Bennie Lazarov, Jacob Carl Epstein, Appellants, v. United States of America, Appellee.	Appeal from the District Court of the United States for the Western District of Tennessee, Western Division.

Decided June 28, 1955.

Before Allen, McAllister and Miller, Circuit Judges.

McAllister, Circuit Judge. This appeal from a criminal conviction is largely a fact case. A great part of the evidence upon which the government relies does not sustain the conviction. Many of the contentions of appellants that there is no substantial evidence to support a verdict of their guilt, fail in the light of the complete proofs. Accordingly, a somewhat developed statement of the facts and the testimony is necessary to an understanding and adjudication of the case.

Appellants, Lazarov and Epstein, were charged in an indictment with conspiring to defraud the United States by impairing, obstructing, and defeating the lawful right and function of the government in the sale and disposal of cer-

tain salvage rope by the Army Corps of Engineers. Jointly indicted with Lazarov and Epstein, was Don J. Kimberling, an official of the government. Kimberling was found not guilty by the jury. Lazarov and Epstein were convicted, and they appeal.

Appellants claim that the verdict was not sustained by substantial evidence that appellants conspired to commit the offense charged; that the trial court erred in its instructions to the jury, and in refusing to instruct

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as requested by appellants; and that the argument to the jury by the district attorney constituted prejudicial reversible error.

To state the facts in somewhat more detail, the offense alleged was that the three men above named conspired to defraud the government in the purchase of rope which appellants bought at the depot of the Army Engineers located on the right bank of the Mississippi River at West Memphis, Arkansas. The rope in question was sold to appellants at auction at the government depot, but since the exact quantity in weight was not ascertained at the time of sale, the entire amount on hand was sold, appellants agreeing to pay therefor $7.53 per hundred pounds. The Army Engineers had no weighing scales at their depot, and it was, therefore, agreed that appellants, as purchasers, would take the rope over to the weighing scales of the Southern Tin Compress Company in Memphis; that the rope would there be weighed by an official government weighmaster; that weight tickets certifying the actual weight of the rope would then be issued by the weighmaster; and that the weights so certified should be conclusive as to the actual weight of the rope and, accordingly, as to the amount of money to be paid to the government by appellants, Lazarov and Epstein.

The evidence discloses that appellants Lazarov and Epstein were partners operating the L. & E. Rag and Paper Company, and it is the claim of the government that they caused the rope to be loaded in their trucks at the Engineers depot for transportation to the official weighing scales in Memphis, Tennessee; that, instead of taking the rope directly to the scales, they caused it to be taken first to their yard, where a substantial portion—an aggregate of 5,160 lbs.—was removed; that they then transported the balance to the scales where, consequently, only a portion of the rope loaded at the government depot was weighed and certified; and that appellants paid only for the amount of rope so weighed, thus defrauding the government out of that amount of the purchase price represented by the rope which appellants caused to be removed to their yard, before it was weighed.

Kimberling was the salvage officer of the Army Engineers at its depot in West Memphis. It was his duty to follow, in a government car, the trucks of the purchasers of material to be weighed—in this case, the trucks of appellants; to observe the weighing of the rope; and to certify to the weights from the official weight tickets, in order that the government should receive

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proper payments for the rope according to the actual weights. It is the further claim of the government that Kimberling conspired with appellants to defraud the government; that he knew of the removal of a quantity of rope at appellants' yard before it was weighed; and that he corruptly certified to the official weights, knowing that they did not correctly represent the amount of rope which appellants had received at the government depot. A reading of the complete transcript of the testimony indicates that the government was of the opinion that Kimberling was the key man in the conspiracy for

the obvious reason that it considered that the claimed fraud could not have been carried out without his connivance.

Appellants claim that all of the rope was weighed first at the official scales; that thereafter, a certain amount of rope was removed from some of the trucks for the purpose of mixing it with an inferior grade of rope in order to get a better price for the batch; that appellants, after purchasing the rope from the government, sold it at an increase in price to A. Karchmer & Sons, of Memphis; that, after the rope was weighed, they transported it to Karchmer's place of business, where it was loaded into boxcars for shipment to Karchmer's customers in New York; and that they paid the government for all the rope they secured at the Engineers Depot, and which they subsequently sold to Karchmer.

It appears that the Federal Bureau of Investigation first became interested in the matter when it received certain information as a result of an anonymous tip. For a considerable time before the sale at auction of the rope in question, the agents of the Bureau had been in close communication with the chief officer of the Army Engineers at West Memphis, Colonel Allen F. Clark, Jr. In fact, the first intimation received by Colonel Clark that anything was amiss, was at the time he was interviewed by the agents and was told that they had information that government property was being stolen from the depot. When Colonel Clark received this information, he immediately caused the Army Engineers to undertake an investigation of its own, and, at the same time, cooperated with the Bureau.

As a result of his investigation and the information received from the Federal Bureau of Investigation, Colonel Clark discharged Kimberling, who had served fourteen years with the Army Engineers as a civilian employee.

But in spite of the charges against Kimberling and his indictment in the present case, and the

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insistence of the agents of the Federal Bureau of Investigation that he was the key man in the conspiracy to defraud the government, Colonel Clark, as he testified upon the trial of this case, stated that after many weeks of investigation, he came to the conclusion that Kimberling was innocent of the crime charged, and that he was to be blamed in the matter only because of his negligence, apparently, on the ground that he did not follow appellants' trucks closely enough, or lost them in traffic between the government depot and the weighing scales, and improperly certified as to the weights. Kimberling himself, upon his discharge from the Army Engineers, demanded a hearing, in accordance with his rights under Civil Service, and appeared before the official board of investigation, at which time he gave an account of his actions, submitted to examination, and insisted not only that he was not guilty of conspiracy, but denied that he had been guilty of any negligence whatever in the matter. His discharge, however, was sustained, as has been said, on the ground of negligence. When the agents of the Federal Bureau of Investigation questioned Kimberling before the indictment had been returned, he told them, in answer to their advice to him, that he did not care to consult a lawyer before discussing the matter with them; and he forthwith gave them a voluntary statement, which was reduced to the form of an affidavit, and sworn to by him, in which he set forth the manner in which he had followed the trucks from the government depot to the weighing scales; and he therein declared that he knew that every one of the trucks had been weighed before any rope was removed at appellants' premises. As heretofore stated, the jury found that Kim-

berling was not guilty of the crime charged against him of conspiring to defraud the government.

The government's case against Lazarov and Epstein is based upon the testimony of John Rayford, a truck driver for appellants, as well as upon the testimony of several agents of the Federal Bureau of Investigation, and circumstances, which the government contends, prove the guilt of appellants.

Rayford, a temporary employee of appellants, testified that a quantity of the rope in question which he hauled from the government depot was removed from appellants' trucks before it was weighed at the scales of the Southern Tin Compress Company. He further testified that Epstein, who was at appellants' premises, instructed him, after such rope had been removed, to take the truck with the balance of the rope down to the scales of the

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Southern Tin Compress Company and have it weighed; and that he followed these instructions. If Rayford is to be believed, and if the jury believed him, the government proved its case on his evidence.

Rayford's testimony, however, is attacked by appellants on the ground that it is inconsistent, contradictory, and uncertain; and it is submitted that it is destitute of any probative value and that a verdict based thereon is not sustained by substantial evidence, which, as appellants correctly contend, must be competent, credible, and such that a reasonable mind might accept as adequate to support a conclusion.

One of the principal grounds upon which the credibility of Rayford is assailed is that his testimony is directly contrary to an affidavit which he made shortly after the event. It appears that two agents of the Federal Bureau of Investigation interviewed him a few days after the rope was

transported from the government depot by appellants. Rayford repeatedly told the agents that none of the rope had been removed from the trucks before it had been weighed, but that a considerable quantity had been removed from some of the truck loads after it had been weighed, and before it was taken to the railroad boxcars for shipment by Karchmer. As a government witness, Rayford stated that one of the agents showed him his badge and told him to hold up his hand. He went on: "He swore me in, told me to hold up my hand—showed me a badge. . . . And he says, 'We are the FBI men.' And said, 'You don't have to make no statement'—or something like that. . . . He said, 'But we was following the truck that you were driving'—and he said, 'We want to know from you in your own words . . . What did you all do with that rope?' And I don't know what I told them. But he told me . . . 'we know the truth, and we want you to tell the truth. The truth is all we want about the thing. So far as you being concerned, you are not involved in it, and you are not concerned in it . . . It doesn't make any difference with us, but we just want the truth . . . Now, we know the truth, and come on, tell us the truth' . . . They told me I could go to jail if I did not tell the truth . . . Well, he just kept on, and he told me that he was going to carry me down to some higher officers there." Rayford was asked on cross-examination whether the idea in taking him to some higher officers was because of the fact that he wouldn't tell the agents what they wanted him to tell them, and he replied: "I kept zigzagging . . . after I found out there was something wrong with it—I didn't

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want to have nothing to do with it." Rayford, however, after his interview with the agents of the Federal Bureau of Investigation, signed a statement, witnessed by two of the agents, setting forth that an amount of rope was re-

moved at appellants' premises before it was weighed at the scales. It was defense counsel who introduced this statement in evidence, and then introduced another affidavit that Rayford had signed a few days after the first affidavit. On this occasion, it appears, one of the counsel for defendants, accompanied by a court reporter, formerly an official court reporter for the Department of Justice, went to see Rayford at his home in the midst of his family. After a few minutes of discussion, the counsel asked Rayford a number of questions, which Rayford voluntarily answered. The questions and answers were taken down in shorthand by the court reporter, afterward transcribed by him in typewritten form, and signed and sworn to as the truth by Rayford. In this statement, Rayford set forth that he had told the government agents that the rope was thrown off the trucks at appellants' premises **after** it had been weighed at the scales. He further stated that this was the truth. He went on to declare in the second affidavit that the agent of the Federal Bureau of Investigation told him that they were just after a statement from him; that they were going to lock him up because he wouldn't tell the truth; that they had seen what was happening; that they were going to put him in jail and that the higher officers might send him to the penitentiary if he did not tell the truth; that they knew what had happened and told him every street he had traveled in the truck with the rope from the government depot to appellants' premises; that they were telling him what had happened rather than his telling them; that in spite of his telling them that the rope had been thrown off the truck after it was weighed, which was the truth, they were telling him that that was not the truth. He further stated that he was scared about what would happen to him after their telling him about jail and the penitentiary.

As a witness for the government, Rayford testified that a week or so after he had been transporting the rope, he "wasn't sure" about the transaction; that, at that

time, he did not know what he was doing—"I didn't know nothing about it"; that after the Federal Bureau of Investigation agents talked to him, he "began to study about it"; and that after three or four months, it came back very clearly to him; and that his memory of what he did with the rope was better in November, 1953, at

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the time of the trial, than it was nine months earlier at the time of the actual happening. There was no claim made that appellants or anyone else had asked Rayford to tell anyone anything different from the actual facts, at any time, or that there was any motive on his part or any inducement made to him to stand stubbornly, for a considerable time, on his first story—in spite of threats of jail and the penitentiary—that no rope had been removed before it was weighed at the scales. At that time, Rayford did not know anything about the transaction, or what charge was being made against appellants, or how they were, or might be, implicated. Nor was any reason shown why he should falsely make a long affidavit, in question and answer form, swearing to the facts in the presence of the court reporter, directly contrary to his statement to the agents of the Federal Bureau of Investigation, as well as directly contrary to his testimony on the trial of this case. No one had approached him to do anything to favor appellants—and, in any event, he had no idea what effect his affidavit would have in the matter. The government does not claim that Rayford was trying to protect appellants or anyone else, when he first told the agents that the rope was removed from the trucks at appellants' premises only after it was weighed at the scales.

The least that can be said of Rayford's testimony is that he was afraid that he might go to jail unless he told the agents what they wanted to hear, regardless of

the fact. Counsel for the government, in his closing argument to the jury, went out of his way to say that if they wanted "to just discount Rayford's testimony," there was plenty of other evidence to prove the guilt of the defendants. Standing alone, Rayford's evidence, because of its uncertainty and contradictions, would not sustain the verdict of the jury.

We come, then, to the evidence of the agents of the Federal Bureau of Investigation. These agents, for the most part, trailed the truckloads of rope from the time they left the government depot. Two government cars were used, with two agents in each car. One car would follow a certain distance, and then "go off surveillance" —a phrase often used to mean that they had lost track of the truck they were trailing in the crowded traffic. Frequently, it appears from the testimony, the agents in one car would communicate with those in the other car by radio telling them they were dropping surveillance, while the others would then pick it up. This was done, it was stated, because of traffic difficulties, and in order

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to avoid being discovered. Most of this testimony is very unsatisfactory, as it is impossible to ascertain whether the government car coming on surveillance, when the other government car went off, actually picked up the trail of the trucks that were sought to be followed. The agents in one government car, at such times, would not see the agents in the other government car. They would assume that the other car had picked up the trail, but the important questions whether that was actually done, and when, and where, are left, in most instances, to conjecture.

In one of the instances strongly relied upon to show the guilt of appellants, a government car with two agents followed a truck load of rope to appellants' premises, where it turned into the yard of the Rag and Paper Company,

before going to the weighing scales. The government car passed by, and continued on for a distance of approximately 1,800 feet, where it turned right and proceeded past several streets for a distance of 1,500 feet, turned right again, and continued for another 1,500 feet along a street parallel to the street which appellants' premises faced. At a point 300 feet from appellants' yard, one of the agents got out of the car and advanced some distance to a location where he could see, through a wire fence, the truck load of rope in appellants' yard; and as he watched it, he saw a number of laborers throwing rope off the truck.

The government claims that this evidence is clear proof that the rope was removed at appellants' yard before it was weighed. However, the weighing scales were located only 1,500 feet from appellants' yard. After the truck had first stopped at the yard, it could have been driven to the scales, weighed within a few seconds, and driven back to the yard before the government car reached the point where the agent made his observation through the wire fence. The government car had to travel about 5,000 feet, while the truck, if it went from appellants' yard to the scales and back, traveled about 3,000 feet. Moreover, the government car had to cross at least three railroad tracks and a number of intersections on streets on which there was fairly heavy traffic; and it does not appear how long a period elapsed between the time the agent got out of the car and the time where he made his observations of the unloading of the rope. There is unquestioned testimony that some of the truck loads of rope first stopped at appellants' yard for directions before proceeding to the scales and, as to at least three of those instances, the government does not claim

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that rope was removed before it was weighed. In brief, there was time for this particular truck load of rope, which

was observed by the agent, to be driven to the scales, weighed, returned to the yard, and partially unloaded, before the government agent arrived at his place of observation; and the evidence that the rope was removed at the yard, at that time, is consistent with appellants' innocence, especially in view of the fact that appellants admitted having removed rope from three of the trucks—but only after it had been weighed. The evidence of the government agent's observation above mentioned does not sustain a verdict of guilt on the part of appellants.

There is, however, evidence that supports the government's charge that rope was removed from certain truck loads at appellants' yard before it was weighed by the government weightmaster at the scales of the Tin Compress Company.

It is agreed that altogether there were six truck loads of rope transported from the Army Engineers Depot by appellants' trucks—two on March 4, two on March 5, and two on March 6. There is no proof or claim made by the government that any rope was removed at appellants' yard on March 4; but it is claimed that rope was removed at appellants' yard before weighing from at least one of the truck loads on March 5, and from both of the truck loads on March 6. Appellants concede that rope was removed at their yard from three of the truck loads, but, as above mentioned, they claim it was removed after the weighing at the official scales.

Agent Dawson testified as to the two truck loads of rope which were transported from the government depot of the Army Engineers on March 6. He stated that both truck loads were driven to appellants' yard, where they turned in. He further testified that they afterward were driven to the Tin Compress Company; and that after they left the Compress Company, they did not return to appellants' premises. This is proof that the rope was not

removed from these trucks after it was weighed at the government scales, and, consequently, if any rope had been removed therefrom, it must have been before it was weighed at the official scales. Agent Stanton testified that he and Dawson had followed the first truck load on March 6 from the Army Engineers to appellants' yard where it turned in. Stanton stated that he and Dawson then drove just north of the Tin Compress Company, where they waited; that after about ten minutes, they saw the same truck turn into the Compress Company

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to be weighed; that when the truck load of rope came out of the Compress Company's premises, they followed it from that point to the railroad boxcars, and saw that an appreciable amount of the rope was gone from the truck as compared with the load they had observed when it left the Engineers Depot. If any rope had been removed from the truck, it must have been removed at appellants' yard before weighing at the Compress Company, if Agent Stanton's testimony is believed, as, according to him, the rope was missing from the truck when he observed it immediately after it was weighed at the Compress Company; and it, obviously, was not removed at the place it was being weighed by the official government weighmaster. If any rope had been removed from these trucks, and they did not return from the scales to appellants' yard before proceeding to the railroad boxcars, the conclusion is inescapable that the rope was removed before weighing.

With respect to the other truckload of rope transported from the Army Engineers Depot on March 6, Agent Dawson testified that he and Agent Stanton had observed this second truck when it was crossing the bridge over the Mississippi after leaving the Army Engineers Depot; that they had then proceeded to a point north of the Tin Com-

press Company to wait for the truck; that when he and Agent Stanton were notified that the other agents who were following the truck were leaving surveillance, he got out of the government car in which he and Stanton were waiting just north of the Compress Company, and proceeded on foot to a point on Seventh Street between the Compress Company and appellants' yard; that about 3:30 in the afternoon, he saw the second truck loaded with the rope come out of appellants' yard; that when it passed him on the way to the Compress Company, he noticed there was 25% less rope on the truck than when he had seen it at the bridge; that after the truck went into the Tin Compress Company to be weighed, he and Stanton followed it; that it did not return to appellants' yard, but continued directly on to Karchmer's where it was loaded into the box-car. If the testimony of Dawson and Stanton is accepted, there is evidence to support a finding that a considerable amount of the rope was removed from the trucks at appellants' yard before it was weighed at the Compress Company. It is our conclusion that there was evidence to support a finding that the rope in question was removed under the direction of appellants who, as has been said, admitted giving such directions, but who

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insist that the rope was removed only after it was weighed at the government scales.

Moreover, it is admitted by Epstein and Lazarov that 5,160 lbs. of rope was removed from the trucks and deposited at their yard; and it is this particular batch of rope upon which the whole case before us depends. They, however, claimed that the reason that this rope was removed at their yard after it was weighed in the trucks at the official scales was in order to mix it with some rope of an inferior grade, which they had on hand, so that they could

get a higher price for the mixed batch than if they had sold this portion of government rope and the inferior rope separately. The rope which was removed from the trucks at appellants' yard, however, was never mixed with the inferior rope. Appellants' explanation why the plan to mix the rope was not carried out is that on the last day of deliveries of the rope by appellants to Karchmer, and after the six truck loads had been delivered to him, Lazarov drove down to Karchmer's place of business where the rope was being loaded into boxcars, and casually remarked to Karchmer that a quantity of the government rope which they were selling him was being mixed with inferior rope at appellants' yard in order that appellants could "get by" with a higher price for the poor rope. Karchmer, who was a witness for appellants, testified that he then told Lazarov that he was selling the rope "on consumer's report," which meant that Karchmer's purchasers could reject the shipment if all the rope did not correspond to the grade sold, and that, in such an event, Karchmer would be obliged to hold appellants for any resulting loss. Karchmer went on to testify that Lazarov, on being told of this situation, gave up the idea of mixing the rope, and called his office by telephone, giving directions, in Karchmer's presence, to someone in the office, not to mix the inferior rope, but to load and send down the good rope at once; that shortly thereafter, a small pick-up truck arrived at Karchmer's with "a piece of a load"; that, at that time, the driver of appellants' pick-up truck handed Karchmer a weight ticket for the rope showing that it had been weighed, not by the government weighmaster at the official scales, but by someone using the scales located at appellants' yard; that such weight ticket showed the batch to weigh 5,160 lbs.; and that this batch of rope was thereupon loaded in one of the boxcars for shipment by Karchmer with the other rope that had previously been delivered by appellants. The weight ticket in question was a printed form with the heading

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of Lazarov Bros. Steel Company, addressed, in handwriting, to A. Karchmer & Son, showing the gross weight, the tare weight, and the net weight of 5,160 lbs.

Karchmer further testified that, by giving a credit, he paid appellants for 55,000 lbs. of rope,[1] which was the total shown by the official government weight tickets; that he paid no attention to appellants' weight ticket of 5,160 lbs.; and that this latter amount was not added to the aggregate government weight of 55,000 lbs. upon which he paid appellants.

Karchmer stated that he had agreed to pay appellants $7.75 per hundred pounds for rope which appellants purchased from the government. But Karchmer did not weigh the rope as he received it from appellants, or at any other time. He testified that he had agreed to accept the government weights on the rope, and to pay appellants for the same weights upon which appellants paid the government, without even seeing the government weight tickets. It was these government weights, as has been said, that totaled 55,000 lbs.

From the foregoing circumstances—the weighing of the 5,160 lbs. of rope at appellants' yard, and the sending of appellants' personal weight ticket therefor to Karchmer; the claim that the rope was removed from the trucks to be mixed with inferior rope; the agreement between Karchmer and appellants that Karchmer was to pay appellants for his purchase of the rope from them, solely on the basis of the official government weights—it not only appears that appellants' defense is inconsistent with the facts, but that the circumstances strongly tend to support the government's claim that the rope in question was removed

[1] Two hundred and ten pounds had been deducted by agreement between appellants and Karchmer because cork bumpers of no value had been included in the aggregate weights.

from the trucks before it was weighed at the government scales, and that there was, therefore, sufficient evidence to support the jury's finding that appellants were guilty of the offense charged. For the government, as mentioned above, claimed that appellants had engaged in a swindle by securing the 5,160 lbs. of rope from the government, without paying for it, and, thereafter, selling it to Karchmer.

In this regard, it is to be emphasized that Karchmer claimed that the agreement between him and appellants was that he was to pay them solely on the basis of the government weight tickets and, in this, his testimony was undisputed. If the 5,160 lbs. of rope had been

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weighed at the government scales before it was removed at appellants' yard, there would have been no need to weigh it again at appellants' yard, and no need to send appellants' personal weight ticket down by the truck driver, with the load, to Karchmer.

Without any reasonable explanation, or any explanation whatever, forthcoming, the jury was justified in believing that the 5,160 lbs. had not been previously weighed at the government scales; that it had been removed at appellants' yard from various truck loads before they were weighed at the government scales; and that this batch of rope was sold—on appellants' own weight ticket—to Karchmer, in addition to the other government rope which had been weighed at the official scales. If this were the case, obviously appellants would not have paid the government for the rope, as they paid only according to the official government weight tickets; and this batch would not, under the inferences that could reasonably be drawn by the jury, have been included in the weights shown upon the official weight tickets on which appellants paid the government;

and, therefore, obviously, the government would have been swindled out of the price for 5,160 lbs. of rope.

With regard to the claim that the 5,160 lbs. of rope had first been weighed at the official scales and then removed from the trucks at appellants' yard in order to mix it with inferior rope and get a higher price, this contention falls too because of inherent contradiction. For the natural questions arise: If Karchmer was to pay appellants solely according to the weights on which appellants paid the government, how could anyone have known how much inferior rope had been mixed with the government rope? How could appellants get a higher price from Karchmer from the mixed rope if Karchmer was to pay only official government weights for the rope sold by appellants? Karchmer was not weighing any of the rope; and there was no understanding that appellants were to weigh any of the rope. The government was to be paid on the official weights, and appellants were likewise to be paid by Karchmer according to the official weights. How, then, were appellants to secure any price at all for the inferior rope? How could they have charged Karchmer anything for such inferior rope when they would not know how much was in the batch; and how could they tell how much inferior rope was mixed with that part of the government rope which had been removed at their yard, when they did not know either the weight of the inferior rope or of the govern-

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ment rope they had removed? If Karchmer was to pay appellants solely on government weights, there could have been no plan to mix a lot of inferior rope with the government rope to get a higher price for the batch; and if there was no plan to mix the 5,160 lbs. of government rope with the inferior rope, there was no honest reason advanced for having removed the government rope at appellants' yard. Appellants' explanations are inconsistent with the truth.

If there were any truthful explanations, they were not given. In the light of the above circumstances, and in view of the testimony of Agents Dawson and Stanton, heretofore discussed, the jury was justified in concluding that the 5,160 lbs. of rope had been removed at appellants' yard before being weighed at the government scales, and that appellants had never paid the government for such rope, and never intended to.

In this regard, it also appears from the evidence that Agent Stanton, of the Federal Bureau of Investigation, interviewed Karchmer in the course of his investigation, and, on the trial, testified that Karchmer told him that the 5,160 lbs. of rope delivered to him was in addition to the 55,000 lbs. he had already received. The aggregate weight of the rope, according to the official government weight tickets, was, as mentioned above, 55,000 lbs. Accordingly, the foregoing testimony of Stanton constituted evidence that sustained the government's claim that the 5,160 lbs. had never been weighed at the official scales, although it was admitted by appellants that this was rope which had been received by them from the Army Engineers at the government depot. It is to be said that Karchmer strongly disputed having told Stanton that the 5,150 lbs. of rope which he had received was in addition to the 55,000 lbs. that had theretofore been delivered; but the credibility of the testimony was for the jury.

As to the proof of conspiracy, it appeared that, as mentioned above, Lazarov and Epstein were partners; that they both knew of the purchase of the rope from the government and of the sale to Karchmer. The evidence further discloses that Epstein was present, giving instructions and supervising the unloading of the rope at appellants' premises; that Lazarov was at Karchmer's premises at the time the last delivery truck arrived there, and, at that time, informed Karchmer that the balance of the government rope was at appellants' premises; that Lazarov also gave

the instructions to appellants' office to send the balance of the rope, which

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had been removed at the yard, down to Karchmer. A conspiracy may be established by circumstances; and if the jury believed that the rope in question was removed at appellants' yard before it was weighed by the government weighmaster, the foregoing circumstantial evidence was sufficient to warrant the drawing of inferences that both appellants were engaged in the transaction of removing the rope before it was weighed, and in the conspiracy charged. The fact that Kimberling was acquitted of the charge of conspiracy is of no avail on appeal to Epstein and Lazarov and does not affect the verdict as to them. **Baxter v. United States**, 45 F. 2d 487 (C. C. A. 6); **United States v. Austin-Bagley Corp. et al.**, 31 F. 2d 229 (C. C. A. 2).

Appellants contend that the district court committed reversible eror in charging the jury, as follows: "It is . . . incumbent upon the Government, before you can convict the defendants, to establish to your satisfaction beyond a reasonable doubt that the crime, or crimes, charged in the indictment, and every constituent element thereof, have been committed; that the same was committed within the Western Judicial District of Tennessee, the Western Division, before the finding of this indictment. And there is not any question about that. The Court instructs you as a matter of law that it did happen in this particular division of the Court. And that the defendants at the bar committed the crime, or crimes, in such manner as would make them guilty under the law heretofore defined and explained to you."

The foregoing, appellants' counsel contend, was equivalent to a directed verdict of guilty, as they argue that the pertinent portion of the above charge read, in effect: "The

court instructs you as a matter of law that the defendants at the bar committed the crime or crimes in such manner as would make them guilty."

On the other hand, the government submits that the charge consisted of a proper statement of the law; that the court was instructing the jury as to where the crime was committed and interpolated: ". . . And there is not any question about that. The Court instructs you as a matter of law that it did happen in this particular division of the Court . . .," and then resumed his formal instruction to the effect that the government was obliged to establish to the jury's satisfaction, beyond a reasonable doubt, "that the defendants at the bar committed the crime, or crimes, in such manner as would make them guilty under the law."

(Opinion Page 16).

No exception was taken to the instruction but, of course, an appellate court will consider an error in the charge which is seriously prejudicial or amounts to a grave miscarriage of justice even though no objection was made in the trial court. The government's interpretation of the instruction is completely persuasive and in keeping with the entire charge as to the presumption of innocence, as well as the government's burden of proving appellants' guilt beyond a reasonable doubt.

On the question of claimed prejudicial argument by the district attorney, it appears that it was called forth by arguments of counsel for appellants, and was in answer thereto.

As to other claims of error that the district court failed to give requested instructions, it appears that they were covered in the general charge.

In accordance with the foregoing, the judgment of the district court is affirmed.

ORDER DENYING THE PETITION FOR REHEARING.

(Denied August 24, 1955.)

Nos. 12,172, 12,173.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

Bennie Lazarov, Jacob Carl Epstein, Appellants,

v.

United States of America, Appellee.

Order.

Before Allen, McAllister, and Miller, Circuit Judges.

The petition for rehearing is denied.

Approved for entry:

.....
United States Circuit Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 393

BENNIE LAZAROV AND JACOB CARL EPSTEIN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 21-41) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1955, and a petition for rehearing was denied on August 24, 1955 (Pet. 21, 41, 42). The petition for a writ of certiorari was filed on Sep-

tember 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence of the existence of a conspiracy to warrant petitioners' convictions.

2. Whether convictions of the two petitioners found guilty were properly affirmed, despite the fact that a third co-conspirator was acquitted by the jury.

3. Whether allegedly improper remarks in the prosecution's closing argument deprived petitioners of a fair and impartial trial.

4. Whether the court erred in its affirmative charge to the jury, and in refusing certain requests to charge.

STATEMENT

Petitioners Lazarov and Epstein, together with one Kimberling, were charged, in an indictment returned in the United States District Court for the Western District of Tennessee, with a conspiracy to defraud the United States by impairing the functions of government in the sale and disposal of rope by the Army Corps of Engineers (App. a, 3-8). The jury found the two petitioners guilty, but acquitted Kimberling (App. a, 8-9). Each petitioner was sentenced to three years' imprisonment and fined $2,500 (App. a, 2). On appeal the convictions were unanimously affirmed (Pet. 41).

Petitioners Lazarov and Epstein were partners operating the L. & E. Rag Paper Company in Memphis, Tennessee (App. a, 69; App. b, 10). Peti-

tioner Lazarov's steel company had been the successful bidder, at $7.53 per hundred pounds, for a quantity of rope from the Army Engineers' Depot across the river in Crittenden County, Arkansas (App. a, 11, 12, 75, 4). Since the Army had no weighing scales at its depot, it was the duty of defendant Kimberling, an Army civilian employee, to follow the trucks loaded with the rope for weighing at the scales of the Southern Tin Compress Company in Memphis and to certify the weights. Delivery was made in six truckloads, two each on March 4, 5, and 6, 1953 (App. a, 13). The Army was paid for 55,210 pounds of rope (App. a, 13-14, 15, 16).

The government's theory was that some 5,160 pounds of rope had been removed by petitioners at the L. & E. yard before weighing on the official scales, so that the government was not paid for this rope. Petitioners' version was that all of the rope had been first weighed at the official scales, and that the admitted removal of some of the rope at the L. & E. yard occurred after the weighing (Pet. 24).

Prosecution witness Rayford, a truck driver for petitioners, testified that some of the rope was removed from his truck on three different loads at the L. & E. yard before it was weighed at the scales of the Southern Tin Compress Company; that petitioner Epstein, after removal of the rope, instructed him to take the rest of the rope to Southern Tin for weighing, and from there to Karchmer's[1] warehouse for railroad shipment;

[1] Karchmer purchased the rope from petitioners (App. a, 132).

and that he followed Epstein's instructions. Rayford stated that during the loading operations he saw petitioner Lazarov at the Engineers' depot. (App. b, 11-14; App. a, 32-33.)

On March 17, 1953, Rayford gave a written statement to the F. B. I. which was in accord with the testimony he gave at the trial (App. a, 44-46). On cross-examination Rayford testified that he made this statement to the F. B. I. agents after they had stated that they knew what the truth was; that they only wanted him to tell the truth; and that he could go to jail if he did not tell the truth (App. a, 40-41). Rayford testified, "I kept zigzagging. I didn't want to have nothing to do with it—that is the main reason—after I found out there was something wrong with it—I didn't want to have nothing to do with it" (App. a, 42). On March 21, 1953, Rayford gave to counsel for petitioners a sworn statement, in substance contrary to the F. B. I. statement, to the effect that he had told the F. B. I. agents that he had thrown the rope off the truck after, not before, it had been officially weighed at the Southern Tin Compress Company; that the agents said they would lock him up because he was not telling the truth; and that they did not know what the higher officers would do, if he did not tell the truth (App. a, 38-40, 42-43, 88-91). After the petitioners had introduced this impeaching evidence, Rayford testified that he was not sure about what he had done with the rope when the F. B. I. agents questioned him, but that he "began to study about it," and that his memory was better at the time of the trial than shortly after the

events involved (App. a, 52).[2] Various F. B. I. agents, with portable radios in their cars to signal the picking up and leaving off of surveillance of the truckloads of rope, observed the shipments which occurred on March 4, 5, and 6, 1953 (App. a, 18, 5-7).

Agent Stanton observed two truckloads of rope leave the depot on March 6 when they were loaded high above the height of the cab. After they left the Southern Tin official scales, he noticed "less rope" and an "appreciable amount of rope gone from the truck". (App. a, 19, 21; App. b, 1-2.) Agent Dawson testified that when a truck came out of the L. & E. yard, he noticed that it had about 25% less rope than when he had observed it previously on the bridge, and that "rope had been removed from the top and the back portion of the load". He also testified that after the trucks left Southern Tin, neither of them stopped at the L. & E. yard. (App. b. 2-3.)

Other agents in their surveillance observed trucks with the later shipments having less rope in them before they arrived at the weighing station than when they originally left the depot. The trucks did not go to the L. & E. yard after having been weighed (App. b, 3-6.)[3]

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[2] The F.B.I. had received a tip that there had been stealing of Army rope, and had started an investigation together with the Army Engineers (App. a, 10-11).

[3] The prosecution introduced in evidence a written statement given to the F.B.I. by defendant Kimberling, in which he stated that he followed all of petitioners' trucks, that none of them stopped at the L. & E. yard, and that no rope was taken off before they were weighed at Southern Tin Compress Company (App. a, 75-76).

Agent Stanton testified as to certain admissions petitioners made during his investigation. According to Stanton, Lazarov stated that he and Epstein were partners in the L. & E. Rag Paper Company. Both petitioners admitted that after the trucks had been weighed, on three different unloadings at the L. & E. yard, about 5,160 pounds of rope was removed. Epstein stated that he himself weighed this amount of rope. (App. a, 69-70.) Lazarov stated that it was under his instructions that the rope was unloaded from the trucks (App. b, 10). Both petitioners stated that they started to mix a cheaper grade of rope with the 5,160 pounds so that a higher price could be obtained, but when they learned that the sale was subject to consumer's report (meaning the purchaser could reject the rope if defective) they decided against that, and delivered only the higher grade rope to Karchmer (App. a, 71).

Karchmer testified as a defense witness that he had agreed to buy the entire lot of rope from petitioners for $7.75 per 100 pounds, and that payment was to be made according to the government weights (App. a, 132). On March 6 at Karchmer's warehouse, when Lazarov spoke of his intention to mix some inferior rope "to get by with it," Karchmer advised that the sale was subject to consumer's report, after which Lazarov phoned his office to prepare a "piece of load" of good rope (App. a, 136-137). A truck then delivered 5,160 pounds of rope which was added to the railroad shipment. Karchmer testified that he paid petitioners for 55,000 pounds of rope (this being 210 pounds less

than the government weights, to give credit for the weight of the cork bumpers), and denied that the 5,160 pounds was added to the government weights in computing payment. (App. a, 137-138.) This was contrary to agent Stanton's testimony that Karchmer had stated the 5,160 pounds of rope was in addition to the 55,000 pounds he had already received (App. a, 141).

ARGUMENT

1. The exhaustive review of the evidence by the court below completely disposes of petitioners' contention (Pet. 9-13) that the evidence is insufficient to support the verdict.

Petitioners argue in effect that the exculpatory statement by Kimberling and the admissions by the two petitioners to the F. B. I. should be considered as conclusive of their innocence,[4] and that the testimony of the F. B. I. agents should be discounted as completely lacking in credibility. Manifestly it was not required that the agents should have had extensive experience in the handling and loading of rope, to qualify them for testimony as to their visual observation of the removal of as much as 25% of a truckload of rope. The credibility of the witnesses was clearly a question for the jury to resolve, as the court properly instructed (App. a, 202-203). As the court below points out,

[4] In referring to the exculpatory statements in its charge the court instructed that "if you believe these statements, then the [petitioners] are entitled to a verdict of not guilty. The law presumes that these statements are true until or unless they are disproven by evidence which establishes their falsity beyond a reasonable doubt" (App. a, 205).

even without the testimony of the truck driver, Rayford, the evidence by the F. B. I. agents that rope was missing from the later shipments before the trucks came to the weighing station and that they did not stop at petitioners' yard after being weighed, would in itself support the verdict. In addition, the fact that petitioners presented to Karchmer a separate weight ticket of their own for 5,160 pounds, whereas for the rest the Army weight tickets were relied upon, strongly suggests that the 5,160 pounds were additional to that paid for to the Army.

Both courts below having found the evidence sufficient to support convictions, there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

2. There is no merit to petitioners' contention that since the jury acquitted Kimberling, this proved that no conspiracy existed so that their discharge was also required (Pet. 13-15). The jury could have thought Kimberling negligent rather than corrupt and still found ample evidence, apart from that against Kimberling, to support the conspiracy charge against the two petitioners. In *Feder* v. *United States,* 257 Fed. 694 (C. A. 2), upon which petitioners rely, the basis of the decision was that there were only two co-conspirators referred to in the indictment, so that there could be no conspiracy unless both co-conspirators were convicted. This situation is obviously different from the instant case where three co-conspirators

were charged and the two petitioners were convicted. The court properly instructed the jury that "it is necessary that at least two of the defendants be shown to have engaged in a conspiracy before you would be warranted in returning a guilty verdict against any one of them" (App. a, 206).

As noted, there is no necessary inconsistency between the acquittal of Kimberling and the conviction of petitioners. In any event, consistency in a verdict is not necessary. *Dunn* v. *United States*, 284 U. S. 390, 393; *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229, 233 (C. A. 2), certiorari denied, 279 U. S. 863; *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, 898 (C. A. 2); *American Medical Association* v. *United States*, 130 F. 2d 233, 252 (C. A. D. C.), affirmed, 317 U. S. 519; *Breese* v. *United States*, 203 Fed. 824, 831 (C. A. 4); *Belvin* v. *United States*, 12 F. 2d 548 (C. A. 4), certiorari denied, 273 U. S. 706; *Adamston* v. *United States*, 177 F. 2d 370 (C. A. 5); *Baxter* v. *United States*, 45 F. 2d 487, 489 (C. A. 6).[5]

3. Petitioners' contention that they were denied a fair and impartial trial by reason of improper closing arguments of the prosecutors (Pet. 16-18) is without substance when considered in the context in which the challenged remarks were made, and in relation to the court's charge to the jury.

In delivering the first part of the prosecution's closing argument, Mr. Vaden told the jury, "If

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[5] *Murphy* v. *United States*, 18 F. 2d 509 (C.A. 8), cited by petitioners (Pet. 13, 14), involves a factual situation substantially similar to *Dunn* v. *United States*, *supra*, decided later, and thus is not controlling authority.

[petitioners] are guilty, find them guilty. Stand up once. All this hocus-pocus going on all over this country—stand up once." Mr. Vaden followed this by saying that if the prosecutors thought offenders guilty they prosecuted them, not otherwise (App. a, 148). At that time no objection was made to this argument, which petitioners now attack as an improper statement of the prosecutors' personal opinion of petitioners' guilt. The contention is without merit. A prosecutor may express his individual belief in the guilt of an accused if it is based solely on the evidence adduced, and the jury is not led to believe there is other evidence, known to the prosecutor but not introduced, justifying that belief. Cf. *Henderson* v. *United States,* 218 F. 2d 14, 19 (C. A. 6); *United States* v. *Holt,* 108 F. 2d 365, 370 (C. A. 7), certiorari denied, 309 U. S. 672; *Tuckerman* v. *United States,* 291 Fed. 958, 969 (C. A. 6), certiorari denied, 263 U. S. 716. *Berger* v. *United States,* 295 U. S. 78, cited by petitioner, involved a situation where the prosecutor referred to matters outside the record.

Petitioner Lazarov's attorney, in his closing argument, stated that the prosecution was concerned only with obtaining a "conviction, regardless of the facts," and the court sustained objection to this argument (App. a, 151). In final argument for the government, government counsel commented, "I would cut off my right arm above the elbow before I would come in here to you and ask you to send an innocent person to the penitentiary" (App. a, 179, 180). He further stated, "I * * * never would have come before you, if I hadn't

thought these people were guilty—these defendants—beyond a reasonable doubt" (App. a. 195). The remarks were not only proper in themselves under the cases cited above, but were justified as responsive to the unwarranted charge by counsel that the prosecution was interested in obtaining a conviction, regardless of what the evidence disclosed. Cf. *Gridley* v. *United States*, 44 F. 2d 716, 739 (C. A. 6), certiorari denied, 283 U. S. 827; *United States* v. *Battiato*, 204 F. 2d 717 (C. A. 7).[6] In its final charge, moreover, the court instructed that "any personal opinions expressed by the lawyers in argument concerning the matters under investigation have no part in this proceeding and are not to influence you in your deliberations in this case" (App. a, 206).

4. The attacks which petitioners make upon the court's charge to the jury are without substance (Pet. 18-19).

(a) Error is assigned as to the court's refusal to give an instruction to the effect that "an officer of the law has the right and authority to make an arrest for an unlawful offense committed in his presence" (App. a, 208-209). This was merely an abstract statement of law on a matter not strictly relevant to the question of petitioners' guilt or innocence of the conspiracy charge; and consequently the court's refusal to give the instruction was not

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[6] The challenged remark about petitioner Lazarov having bankers testify for him (App. a, 192) was innocuous, fair comment on the evidence, and not objected to at the time it was made. A prominent Memphis banker gave character witness testimony on behalf of Lazarov (App. a, 119-120).

error. Cf. *Jenkins* v. *United States,* 59 F. 2d 2 (C. A. 5), certiorari denied, 287 U. S. 628; *United States* v. *Johnson,* 165 F. 2d 42, 50 (C. A. 3), certiorari denied, 332 U. S. 852; *Marron* v. *United States,* 8 F. 2d 251, 258 (C. A. 9). Whether the F. B. I. agents saw fit to arrest petitioners' truck drivers for suspected larceny of rope (see App. a, 157) was not a relevant issue in the case.

(b) Complaint is made as to the court's refusal to give this instruction: "An overt act alone is insufficient to constitute a conspiracy. There must be an unlawful agreement to which the overt act may be referred" (App. a, 213). The substance of this requested instruction was thoroughly covered in other parts of the charge (App. a, 197-199, 203). It is not necessary that the court repeat instructions already given in different language. *Agnew* v. *United States,* 165 U. S. 36; *Holt* v. *United States,* 218 U. S. 245, 253.

(c) Petitioners complain of the part of the court's charge on venue set out in the margin (App. a, 201).[7] It is said that this was equivalent to a

[7] "It is, therefore, incumbent upon the Government, before you can convict the defendants, to establish to your satisfaction beyond a reasonable doubt that the crime, or crimes, charged in the indictment, and every constituent element thereof, have been committed; that the same was committed within the Western Judicial District of Tennessee, the Western Division, before the finding of this indictment. And there is not any question about that. The Court instructs you as a matter of law that it did happen in this particular division of the Court. And that the defendants at the bar committed the crime, or crimes, in such manner as would make them guilty under the law heretofore defined and explained to you."

directed verdict that the petitioners "committed the crime, or crimes, in such manner as would make them guilty." As the court below held, however (Pet. 40-41), the phrase about there being no doubt that the crime was committed within the particular court district was a mere interpolation. The trial judge was simply indicating (and quite correctly) that there was no dispute that all of the relevant acts to which the testimony related (the deliveries, the weighing of the rope etc.) occurred within the judicial district where the indictment was returned. The conclusion that the instruction, as inflected by the judge, caused no misapprehension on the part of his listeners is attested by the fact that no objection was made by defense counsel either at the time this portion of the charge was delivered or at the conclusion of the charge. The argument now advanced is an afterthought.

The court's charge, moreover, must be read in its entirety. *Boyd* v. *United States,* 271 U. S. 104, 107; *United States* v. *Carruthers,* 152 F. 2d 512, 517-518 (C.A. 7), certiorari denied, 327 U. S. 787; *Taylor* v. *United States,* 142 F. 2d 808, 817 (C. A. 9), certiorari denied, 323 U. S. 723. In other parts of the charge the court elaborated fully on the presumption of petitioners' innocence (App. a, 201) and the fact that it was necessary for conviction to find them guilty beyond a reasonable doubt (App. a, 198, 199, 200, 201, 204, 205, 207). In these circumstances it is clear that the jury could not have misconstrued the challenged portion of the charge.

CONCLUSION

The case was decided in accordance with established legal principles, and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

OCTOBER 1955.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 393.

BENNIE LAZAROV and JACOB CARL EPSTEIN,
Petitioners,

v.

UNITED STATES OF AMERICA.

REPLY TO BRIEF

For the United States in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals, Sixth Circuit.

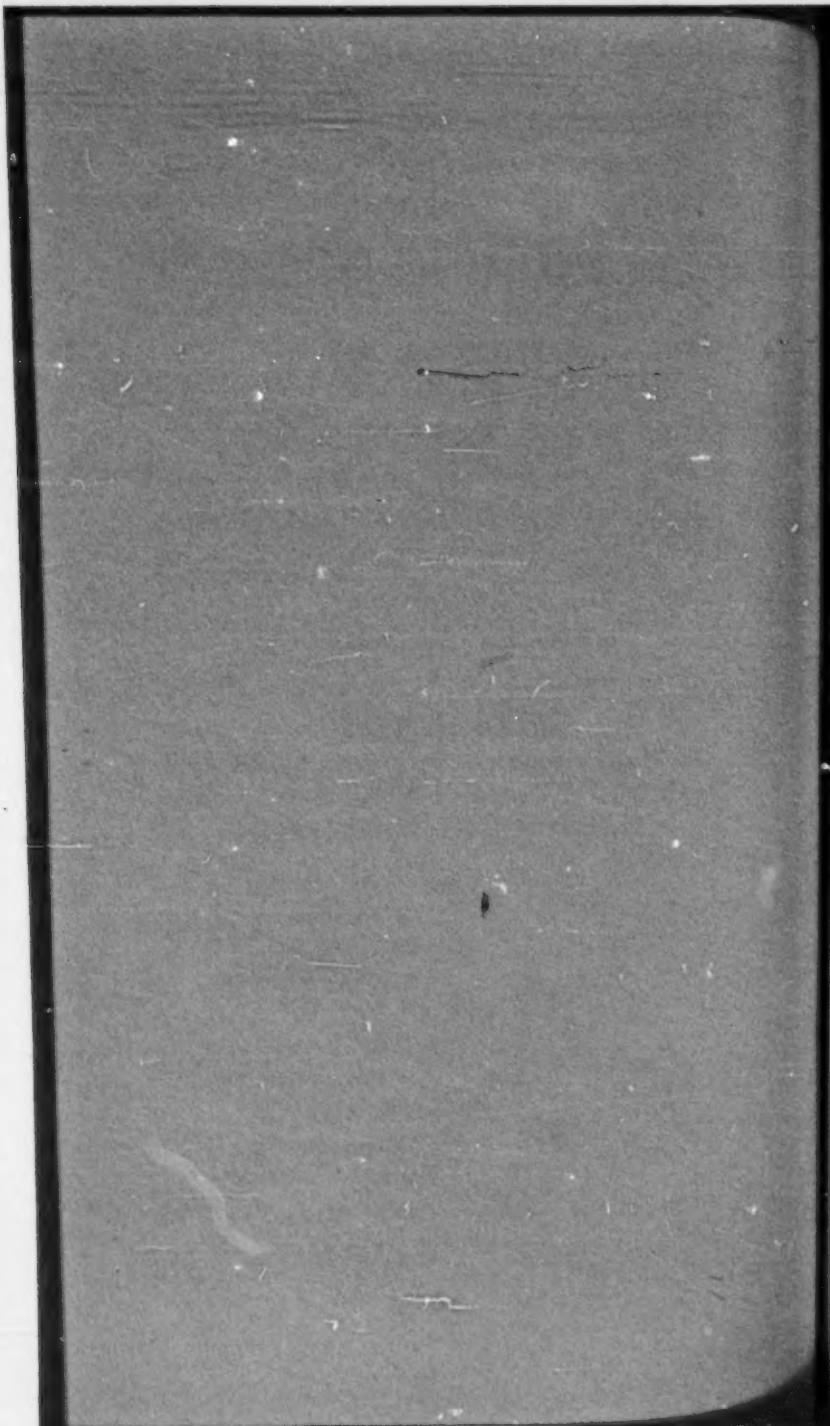
WILLIAM GERBER,
Sterick Building,
Memphis, Tennessee,

L. E. GWINN,
Columbian Mutual Tower,
Memphis, Tennessee,

IRVING M. STRAUCH,
81 Madison Building,
Memphis, Tennessee,

Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.



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For the United States in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals, Sixth Circuit.

At page 8 of the Government's Brief this statement is made:

> "There is no merit to petitioners' contention that since the jury acquitted Kimberling, this proved that no conspiracy existed so that their discharge was also required (Pet. 13-15). The jury could have thought Kimberling negligent rather than corrupt and still found ample evidence, apart from that against Kimberling, to support the conspiracy charge against the two petitioners."

The conclusion that the jury could have thought "Kimberling negligent" and on that basis acquitted him of the conspiracy charged in the indictment is destitute of any factual basis and contrary to established principles of law:

1) The Government did not try the case on any theory of negligence but according to its theory "Kimberling was the key man in the conspiracy." We quote from the Opinion of the Court of Appeals, as set out at pages 23, 24 of the Petition for Writ of Certiorari:

> "A reading of the complete transcript of the testimony indicates that the government was of the opinion that Kimberling was the key man in the conspiracy for the obvious reason that it considered that the claimed fraud could not have been carried out without his connivance."

The contention of the Government on this point is inconsistent with the undisputed, sworn statement of Kimberling given to the FBI agents, from which we quote as follows:

> "None of these trucks went into Lazarov Brothers' place of business before they were weighed.
>
> "To my knowledge all six of these trucks were weighed at the Southern Tin Compress Corporation and no rope was taken off of these trucks before they were weighed." Appendix to Appellants' Brief, page 76a.

2) In explaining the verdict on the ground that "the jury could have thought Kimberling negligent rather than corrupt," the Government indulges in speculation that is contrary to the established principles of Federal law.

In **Murphy v. U. S.** (8th Cir.), 18 F. 2d 509, the court said:

"It is universally recognized that we may not speculate as to the reasoning or considerations that lead to the verdict of the jury."

3) The acquittal of Kimberling removed the basis of the conspiracy charged in the indictment.

In **Feder v. U. S.** (2nd Cir.), 257 Fed. 694, 696, the court said:

"The rule as to convictions in conspiracy may be summed up by saying that, provided the acquittal or death of coconspirators does not remove the basis of the charge, one defendant may be convicted of the offense. Cf. People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; People v. Richards, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 716, and cases, supra."

See also: 15 C. J. S., Sec. 94, p. 1164; 11 Am. Jur., Sec. 26, p. 560; **Green v. Commonwealth**, 264 Ky. 725, 95 S. W. 2d 561, and dissenting Opinion of Judge Donahue in **Gozmer v. U. S.** (6th Cir.), 9 F. 2d 603.

At page 9 of its Brief the Government argues that "consistency in a verdict is not necessary." Among the authorities cited are **Dunn v. U. S.**, 284 U. S. 390, 393, a case that involved separate counts in the indictment, and **U. S. v. Austin-Bagley Corp.**, 31 F. 2d 229, 233. These decisions, however, do not reach the point involved in the instant case. For instance, the court in U. S. v. Austin-Bagley Corp. recognized the principle that the "**verdict must not itself deny the existence of the essential facts.**" Here the verdict denies the existence of the essential facts of a conspiracy between a government agent and appellants to defraud the government by means of weights falsely certified by the government agent, and when this agent was acquitted the conspiracy charge in the indictment crumbled and fell to the ground.

In this situation appellants most assuredly were not guilty of the crime charged in the indictment and in that situation their conviction of any offense constituted sheer denial of due process. **Thornhill v. State of Alabama**, 310 U. S. 88.

The Government at page 9 of its Brief relies upon Dunn v. U. S., supra, and cases following decisions of that case in support of its contention that "consistency in a verdict is not necessary." Petitioners do not question the well-settled rule established by these cases but they are not in point for the reason that the record herein does not involve separate counts in the indictment, but a single count. The keynote of the decision of the Dunn case was that each count in an indictment was regarded as if it were a separate indictment. But that is not the situation here. But the verdict is not only inconsistent in itself but repugnant. The principles that should be applied is thus stated in Mogoll et al. v. U. S. (5th Cir.), 158 F. 2d 792, 793, as follows:

> "A trial on an indictment in separate counts is the same in law as a trial on separate indictments. While the verdict as to each count must be consistent in itself, the verdicts on the several counts need not be consistent with each other."

Quoting the language used by Judge Donahue in Gozmer v. U. S., supra,

> "If this verdict is not fatally inconsistent and repugnant, then these terms may as well be dropped from our legal vocabulary."

To approve it is to condone an arbitrary assumption of power on the part of a jury that is inconsistent with due process. (**Wallace v. Curring** [4th Cir.], 95 F. 2d 856, 867.)

On the facts of this case if the conviction of appellants and the acquittal of Kimberling was not an arbitrary discrimination between persons in similar circumstances, what was it?

Respectfully submitted,

WILLIAM GERBER,
Sterick Building,
Memphis, Tennessee,
L. E. GWINN,
Columbian Mutual Tower,
Memphis, Tennessee,
IRVING M. STRAUCH,
81 Madison Building,
Memphis, Tennessee,
Attorneys for Petitioners.